



## CONSIDERATIONS WHEN APPLYING THE 'REASONABLE ADMINISTRATIVE ACTION TAKEN IN A REASONABLE MANNER' EXCLUSION

### PURPOSE

To provide determining authorities<sup>1</sup> with guidance about what amounts to 'reasonable administrative action taken in a reasonable manner in respect of the employee's employment' (RAA exclusion).

This guidance should be read in conjunction with the Scheme Guidance [Injury suffered as a result of reasonable administrative action](#).

### BACKGROUND

Section 5A(1) of the *Safety, Rehabilitation and Compensation Act 1988* (SRC Act) excludes compensation for an injury suffered as a result of reasonable administrative action taken in a reasonable manner in respect of the employee's employment. The RAA exclusion was inserted into the SRC Act on 13 April 2007 and is intended to exclude entitlement to compensation in circumstances where an injury is the result of legitimate management action taken by an employer. As a result, the exclusion will usually only apply to claims for psychological injuries which are generally characterised as an ailment.<sup>2</sup>

Where a decision maker is satisfied that the employee suffers from an ailment that was significantly contributed to by employment, consideration can then be given to whether the RAA exclusion applies.

### GUIDANCE

Decisions of the courts and Administrative Review Tribunal (Tribunal) have provided guidance about the operation of the RAA exclusion. For the RAA exclusion to apply, each limb of the phrase 'taken in respect of an injury suffered as a result of reasonable action taken in a reasonable manner in respect of the employee's employment' must be met.

This requires a consideration of whether the injury was a result of action which was:

- > administrative action
- > taken in respect of the employee's employment
- > reasonable to take
- > taken in a reasonable manner

If those conditions are met, the decision maker must then consider whether the injury was suffered as a result of the RAA exclusion (required level of employment contribution test).

<sup>1</sup> Determining authority, in relation to a determination, means the person who made the determination [section 60(1) of the SRC Act]. For the purposes of this guidance, the determining authority will be referred to as the 'decision-maker'.

<sup>2</sup> Section 4(1) defines ailment as 'any physical or mental ailment, disorder, defect or morbid condition (whether of sudden onset or gradual development)'.

## Administrative action

Section 5A(2) of the SRC Act provides a list of reasonable administrative actions. The section refers to performance appraisal, counselling, suspension or disciplinary action and anything done in connection with those actions.

The list is non-exhaustive, meaning it does not identify all the administrative actions that may be covered by the RAA exclusion.

### Performance appraisals

This relates to the assessment of the performance of an employee, whether formal or informal. It may include interview performance feedback provided to applicants following an unsuccessful employment application process.

### Formal or informal counselling action

Counselling is an industrial relations term providing for an action or actions that may be taken to assist an employee achieve and maintain a satisfactory standard of work performance. It does not include the type of counselling provided by professionally qualified counsellors.

### Suspension action

This relates to suspension of employment by the relevant employer, rather than suspension of compensation under the SRC Act. Suspension of employment would meet the meaning of administrative action, regardless of whether the employee is suspended with or without pay.<sup>3</sup>

### Formal or informal disciplinary action

This relates to actions such as demotion, pay reductions and terminations. Also, less formal actions, such as discussions with employees of a disciplinary nature.

### Anything reasonable done in connection with the above

This relates to activities that are directly connected to the above administrative actions, such as investigations, mediation action and interviews. It must be shown that there is a clear connection between these actions.

### Anything reasonable done in connection with the employee's failure to obtain promotion, reclassification, transfer or benefit, or to retain a benefit, in connection with his or her employment

'Failure to obtain' considers circumstances where the employee has been unsuccessful in getting, acquiring or securing something related to employment (which they did not already have), while failure to 'retain' considers events where the employee has had a feature of their employment revoked or denied. This includes actions taken in relation to an employee's failure to obtain or retain a role or promotion, such as: decisions of recruitment panels; business restructure decisions (specific to the employee's employment); changes in business processes; or, the renegotiation of an employment agreement.

**Promotion** – including the failure to win a permanent or temporary promotion.

**Reclassification** – including the failure to obtain a role which has been reclassified.

**Transfer** – including transfers within an organisation or to another organisation

**Benefit** – including financial and personal benefits. Financial benefits may include; incremental salary increases, travel, higher duties or on-call allowances and overtime. Personal benefits may include; preferred working hours and flexible working arrangements (such as part time hours and home-based work), perceived prestige, status, influence or power.

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<sup>3</sup> The reasonableness of a suspension action is determined by reference to the circumstances at the time of the suspension, not by reference to whether an employee is later reinstated or exonerated.

## Examples of other administrative actions

The following decisions of the Tribunal show how specific actions that are not included in section 5A(2) were characterised as reasonable administrative action. These Tribunal decisions are for guidance only and are non-binding.

### *Job plan discussions – Buck and Comcare [2012] AATA 327*

The employer encouraged the employee to sign a draft job plan which included duties that they considered were beyond their capabilities, which led to the employee making a claim for mixed anxiety and depression.

The Tribunal found the action taken was a reasonable administrative action because it related to the relationship between the employer and the employee.

### *Employer attendance at an employee's home – Kennedy and Comcare [2013] AATA 696*

The employee had a period of sick leave and the employer required medical certificates in order to process their sick leave entitlements. The employee requested support from their employer to avoid falling into financial hardship. The employer agreed to send a representative to the employee's home to collect the medical certificates and discuss what further support might be provided to them. The employee submitted a claim for adjustment disorder as a result of bullying and harassment at work.

The Tribunal found the action taken was reasonable administrative action because the employer's attendance at the employee's home related to the relationship between the employer and the employee.

## Taken in respect of the employee's employment

A decision maker must also be satisfied that the action(s) of the employer are administrative in nature rather than operational. For action to be 'administrative', it must have been taken in respect of the employee's employment, or with respect to the employment relationship between the employer and the employee.

### *Administrative action in respect of employment*

Administrative actions must be directed specifically to the employee as an individual and their employment, as opposed to actions forming part of the everyday duties or tasks that the employee performs in his or her role.<sup>4</sup>

Not every interaction between an employer and an employee will be an administrative action. The content and the context of the interaction are relevant to the characterisation of an administrative action taken in respect of the employee's employment.<sup>5</sup>

If the action is not directed to the relationship between the employer and the employee, or to the administration of that relationship, it may not constitute administrative action for the purposes of s5A(1).

Matters of general administration, management, team meetings and the implementation of policy are generally excluded from the phrase 'administrative action' as they are unlikely to be directed to the relationship between the employer and employee, and more often directed to a group or class of employees (rather than the individual).

### Example 1

A manager meets with an employee to advise that they will not be extending the employee's contract of service when it ends in four weeks. The employee lodges a claim for anxiety and stress reaction due to the ending of the contract. As the decision not to extend a contract relates directly to the employment relationship between the employer and the employee, this is likely to be considered administrative action.

<sup>4</sup> *Commonwealth Bank of Australia v Reeve* [2012] and *Comcare v Drinkwater* [2018]

<sup>5</sup> *Rutledge and Comcare* [2011]

## Operational action in respect of employment

Administrative actions can be distinguished from operational actions. Operational actions do not fall within the meaning of 'reasonable administrative action' and are not subject to the RAA exclusion.

Operational actions are characterised as employer actions directed at the way an employee is required to carry out their work duties. For example, supervisory action or direction about how and when tasks and duties are to be performed is considered operational.<sup>6</sup>

### Example 2

A manager meets with their team to discuss an upcoming project. During the meeting the manager allocates tasks to team members. One of the team members makes a claim for adjustment disorder, contending that the tasks allocated to them were not aligned with their expertise, resulting in the claimed condition. As the allocation of work tasks was not about the relationship between the employer and employee, the allocation of tasks by the manager is likely to be considered operational action.

### Example 3

An employer decides that a number of team members will be required to change from back office work to front-end service work. The change in duties reflects a change in the employer's business requirements and policies that involves removing back office work from a number of office locations. As the change in duties was not specific to the employer/employee relationship and related to everyday tasks that the employee is required to perform in their role, this action is likely to be considered operational rather than administrative.

The difference between operational action in respect of the duties the employee carries out and administrative action in respect of the employee's employment is not always clear. Decision makers will need to carefully examine the nature and purpose of employment-related actions to determine whether they are taken in respect of the employee's employment.

## Reasonable action

The RAA exclusion provides for two distinct reasonableness considerations. The first consideration is whether the decision to undertake administrative action was reasonable. This assessment should be conducted on a case by case basis.

Relevant considerations include, but are not limited to:

- > evidence which informed the employer's decision to undertake the administrative action, and to choose a particular form of administrative action over another.
- > documentation and proper application of the employer's policies, procedures or guidelines relating to the administrative action taken.
- > any other guidelines or legislation which detail appropriate actions for performance management of the employee – such as the *Public Service Act 1999* or industry specific guidelines.

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<sup>6</sup> *Rutledge and Comcare* [2011]

## Taken in a reasonable manner

The second reasonableness consideration is whether the administrative action was taken in a reasonable manner. This assessment should also be conducted on a case by case basis.

Relevant considerations include, but are not limited to:

- > the circumstances in which the action was implemented and the way in which the action impacts upon the employee.
- > the particular circumstances of the employee and whether the employer was aware, or should reasonably have been aware, of those circumstances.
- > whether the employer complied with relevant policies, procedures or guidelines.
- > whether any investigations or other actions were carried out in a timely manner.
- > whether the actions taken complied with the requirements of natural justice.
- > whether the administrative action was overly aggressive, intimidating or unfair in the circumstances; irrational, absurd or ridiculous; and whether there was anything 'untoward' about the employer's conduct.<sup>7</sup>

The test of reasonableness in section 5A is not prescriptive and allows for the possibility that there may be more than one way an administrative action may be undertaken. The consideration required is not whether the action could have been taken in a more reasonable manner, but whether it was reasonable in the circumstances. A preference by the employee for the action to have been taken in a different way is not a relevant consideration.<sup>8</sup>

Decision makers must ensure that they have considered both reasonableness tests when applying the RAA exclusion.

## FURTHER INFORMATION

This guidance should be read in conjunction with the scheme guidance '[Injury suffered as a result of reasonable administrative action](#)'.

For more information, please contact Comcare's Scheme Policy and Design team on 1300 366 979 or email: [scheme.policy@comcare.gov.au](mailto:scheme.policy@comcare.gov.au).

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<sup>7</sup> *Re Lynch and Comcare* (2010) AATA 38

<sup>8</sup> *Comcare v Martinez (No 2)* (2013) 212 FCR 272